



September 18, 2002

Mr. Anthony S. Corbett
Winstead, Sechrest & Minick
100 Congress Avenue, Suite 800
Austin, Texas 78701

OR2002-5272

Dear Mr. Corbett:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 168790.

The Brushy Creek Municipal Utility District (the "district"), which you represent, received a request for e-mails originated or received after April 10, 2002, that relate to district business and involve the general manager of the district or any member of the district staff; a named district contractor; members of the board of directors; any attorney; representatives of engineering firms; land developers, home builders, or their representatives; and two other named individuals or anyone in their offices. You state that the district has released some of the requested information. The district claims that the remaining requested information is excepted from disclosure under sections 552.104, 552.107, and 552.111 of the Government Code. We have considered the exceptions you raise and have reviewed the information you submitted.

Section 552.104 of the Government Code excepts from disclosure "information that, if released, would give advantage to a competitor or bidder." The purpose of section 552.104 is to protect a governmental body's interests in competitive bidding situations. *See* Open Records Decision No. 592 (1991). Section 552.104 requires a showing of some actual or specific harm in a particular competitive situation; a general allegation that a competitor will gain an unfair advantage will not suffice. *See* Open Records Decision No. 541 at 4 (1990). Section 552.104 does not protect information relating to competitive bidding situations once a contract has been awarded and is in effect. *See* Open Records Decision Nos. 306 (1982), 184 (1978).

The district states that some of the information at Tab A relates to a request for proposals to construct a water storage tank. The district states that it has not awarded a contract and remains in the process of receiving bids and hearing presentations by bidders. The district asserts that it would suffer harm should bidding estimates and internal communications relating to the bidding be publicly disclosed. Based on these representations and our review

of the information in question, we conclude that the district has demonstrated that this information is excepted from disclosure at this time under section 552.104 of the Government Code. We have marked the information that the district may withhold. We note, however, that the district may no longer withhold the marked information once a contract has been executed and is in effect, unless the information is shown to be excepted from disclosure under some other provision of chapter 552 of the Government Code. *See* Open Records Decision No. 541 at 5 (1990).

Next, we address the district's claim under section 552.107 of the Government Code. Section 552.107(1) excepts from public disclosure

information that the attorney general or an attorney of a political subdivision is prohibited from disclosing because of a duty to the client under the Texas Rules of Civil Evidence, the Texas Rules of Criminal Evidence, or the Texas Disciplinary Rules of Professional Conduct[.]

Gov't Code § 552.107(1). Section 552.107(1) protects information that comes within the attorney-client privilege. In instances where an attorney represents a governmental entity, the attorney-client privilege protects only an attorney's legal advice and the client's communications made in confidence to the attorney. *See* Open Records Decision No. 574 (1990). Accordingly, these two classes of information are the only information that may be withheld pursuant to the attorney-client privilege under section 552.107(1).

The district raises section 552.107 with regard to the information at Tabs C and D. The district states that this information consists of attorney-client communications prepared for the purpose of facilitating the rendition of professional legal services to the district. Based on this representation and our review of the information at issue, we conclude that the district has demonstrated the applicability of section 552.107(1) to all of the information at Tab C and much of the information at Tab D. We have marked the information that the district may withhold under section 552.107(1).¹

The district also raises section 552.111 of the Government Code. Section 552.111 incorporates the deliberative process privilege and excepts from disclosure "an interagency or intraagency memorandum or letter that would not be available by law to a party in litigation with the agency." The purpose of section 552.111 is to protect advice, opinion, and recommendation in the decisional process and to encourage open and frank discussion in the deliberative process. *See Austin v. City of San Antonio*, 630 S.W.2d 391, 394 (Tex. App.--San Antonio 1982, no writ); Open Records Decision No. 538 at 1-2 (1990). In Open Records Decision No. 615 (1993), this office re-examined the statutory predecessor to section 552.111 in light of the decision in *Texas Department of Public Safety v. Gilbreath*, 842 S.W.2d 408 (Tex. App.--Austin 1992, no writ). We determined that section 552.111 excepts

¹As we conclude that the district may withhold all of the information at Tab C under section 552.107, we need not address the district's arguments with regard to that information under section 552.111.

only those internal communications that consist of advice, recommendations, opinions, and other material reflecting the policymaking processes of the governmental body. *See* Open Records Decision No. 615 at 5.

This office also has concluded that a preliminary draft of a document that is intended for public release in its final form necessarily represents the advice, opinion, and recommendation of the drafter with regard to the form and content of the final document, so as to be excepted from disclosure under the statutory predecessor to section 552.111. *See* Open Records Decision No. 559 at 2 (1990). Section 552.111 protects factual information in the draft that also will be included in the final version of the document. *See id.* at 2-3. Thus, section 552.111 encompasses the entire contents, including comments, underlining, deletions, and proofreading marks, of a preliminary draft of a policymaking document that will be released to the public in its final form. *See id.* at 2.

The district raises section 552.111 with regard to the remaining information at Tab A, all of the information at Tab B, and some of the information at Tab D. The district states that this information represents the advice, opinions, and recommendations of district personnel with regard to a variety of policy issues that affect the district. The district also seeks to withhold draft documents that appear at Tabs A, B, and D under section 552.111. The district states that the final version of the draft document at Tab A has been released to the public. Likewise, we assume that the final versions of the draft documents at Tabs B and D either have been or will be made public. We note that section 552.111 is applicable to communications that involve a governmental body's consultants. *See* Open Records Decision Nos. 631 at 2 (1995) (section 552.111 encompasses information created for governmental body by outside consultant acting at governmental body's request and performing task that is within governmental body's authority), 563 at 5-6 (1990) (private entity engaged in joint project with governmental body may be regarded as its consultant). Section 552.111 is not applicable, however, to communications with a party with which the governmental body has no privity of interest or common deliberative process. *See* Open Records Decision No. 561 at 9 (1990). Having considered the district's arguments and reviewed the information at issue, we conclude that the district has demonstrated the applicability of section 552.111 to some of the information at Tabs A, B, and D. We have marked the information that the district may withhold under section 552.111.

The remaining information at Tabs A, B, and D includes e-mail addresses that may be confidential under section 552.137 of the Government Code. This exception, which the Seventy-seventh Legislature added to chapter 552 of the Government Code, provides as follows:

- (a) An e-mail address of a member of the public that is provided for the purpose of communicating electronically with a governmental body is confidential and not subject to disclosure under this chapter.

(b) Confidential information described by this section that relates to a member of the public may be disclosed if the member of the public affirmatively consents to its release.

Gov't Code § 552.137. We have marked private e-mail addresses that appear at Tabs A, B, and D. The district must withhold the marked e-mail addresses under section 552.137 unless the individual to whom a particular e-mail address belongs has affirmatively consented to its public disclosure. We note that the requestor has a special right of access to his own e-mail address under section 552.023 of the Government Code. *See* Gov't Code § 552.023(a) (person or person's authorized representative has special right of access, beyond right of general public, to information held by governmental body that relates to person and is protected from public disclosure by laws intended to protect person's privacy interests); Open Records Decision No. 481 at 4 (1987) (privacy theories not implicated when individual asks governmental body for information concerning himself).

We also note that some of the remaining information at Tab B is protected by copyright law. A governmental body must allow inspection of copyrighted materials unless an exception to disclosure applies to the information. *See* Attorney General Opinion JM-672 (1987). However, an officer for public information must comply with the copyright law and is not required to furnish copies of information that is copyrighted. *Id.* If a member of the public wishes to make copies of copyrighted materials, he or she must do so unassisted by the governmental body. In making copies, the member of the public assumes the duty of compliance with the copyright law and the risk of a copyright infringement suit. *See* Open Records Decision No. 550 at 8-9 (1990).

In summary, the information at Tab A that relates to the ongoing competitive bidding is excepted from disclosure at this time under section 552.104 of the Government Code. The district may withhold all of the information at Tab C and much of the information at Tab D under section 552.107(1). Portions of the information at Tabs A, B, and D are excepted from disclosure under section 552.111. The remaining information at Tabs A, B, and D includes private e-mail addresses that must be withheld under section 552.137 unless the individual to whom the e-mail address belongs has consented to its disclosure. The district must release the rest of the requested information. In doing so, the district must comply with copyright law.

This letter ruling is limited to the particular records at issue in this request and limited to the facts as presented to us; therefore, this ruling must not be relied upon as a previous determination regarding any other records or any other circumstances.

This ruling triggers important deadlines regarding the rights and responsibilities of the governmental body and of the requestor. For example, governmental bodies are prohibited from asking the attorney general to reconsider this ruling. Gov't Code § 552.301(f). If the governmental body wants to challenge this ruling, the governmental body must appeal by filing suit in Travis County within 30 calendar days. *Id.* § 552.324(b). In order to get the full

benefit of such an appeal, the governmental body must file suit within 10 calendar days. *Id.* § 552.353(b)(3), (c). If the governmental body does not appeal this ruling and the governmental body does not comply with it, then both the requestor and the attorney general have the right to file suit against the governmental body to enforce this ruling. *Id.* § 552.321(a).

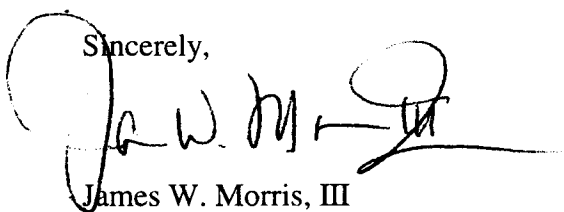
If this ruling requires the governmental body to release all or part of the requested information, the governmental body is responsible for taking the next step. Based on the statute, the attorney general expects that, within 10 calendar days of this ruling, the governmental body will do one of the following three things: 1) release the public records; 2) notify the requestor of the exact day, time, and place that copies of the records will be provided or that the records can be inspected; or 3) notify the requestor of the governmental body's intent to challenge this letter ruling in court. If the governmental body fails to do one of these three things within 10 calendar days of this ruling, then the requestor should report that failure to the attorney general's Open Government Hotline, toll free, at 877/673-6839. The requestor may also file a complaint with the district or county attorney. *Id.* § 552.3215(e).

If this ruling requires or permits the governmental body to withhold all or some of the requested information, the requestor can appeal that decision by suing the governmental body. *Id.* § 552.321(a); *Texas Department of Public Safety v. Gilbreath*, 842 S.W.2d 408, 411 (Tex. App.--Austin 1992, no writ).

Please remember that under the Act the release of information triggers certain procedures for costs and charges to the requestor. If records are released in compliance with this ruling, be sure that all charges for the information are at or below the legal amounts. Questions or complaints about over-charging must be directed to Hadassah Schloss at the Texas Building and Procurement Commission at 512/475-2497.

If the governmental body, the requestor, or any other person has questions or comments about this ruling, they may contact our office. We note that a third party may challenge this ruling by filing suit seeking to withhold information from a requestor. Gov't Code § 552.325. Although there is no statutory deadline for contacting us, the attorney general prefers to receive any comments within 10 calendar days of the date of this ruling.

Sincerely,



James W. Morris, III
Assistant Attorney General
Open Records Division

JWM/sdk

Ref: ID# 168790

Enc: Marked documents

c: Mr. John C. McLemore
8400 Cornerwood Drive
Austin, Texas 78717
(w/o enclosures)